South Carolina Law Review

Volume 67
Issue 4 *SURVEY OF SOUTH CAROLINA LAW AND FOURTH CIRCUIT SURVEY*

Article 3

Spring 2016

One Step Forward, Two Steps Back: Everett et al v. Pitt County School (Everett I and II) and the Ominous Future of Federal Court Desegregation Orders

Mark Dorosin

ONE STEP FORWARD, TWO STEPS BACK: *EVERETT ET AL V. PITT COUNTY SCHOOLS (EVERETT I* AND *II)* AND THE OMINOUS FUTURE OF FEDERAL COURT DESEGREGATION ORDERS

Mark Dorosin*

I. INTRODUCTION

During the brief zenith of school desegregation litigation in the late 1960s and early 1970s, hundreds of school districts across the nation, and particularly across the South, were found liable for intentional racial discrimination and became subject to federal court supervision of approved plans to achieve integration.[1] The period of aggressive enforcement was short-lived however, and by the mid-1970s, and accelerating through the 1980s and 1990s, an increasingly conservative Supreme Court and presidential administrations first slowed the scope and intensity of school integration, and then actively pushed to end judicial enforcement and

---

* Mark Dorosin is the Managing Attorney at the UNC Center for Civil Rights. University of North Carolina, J.D.; University of North Carolina-Greensboro, M.A.; Duke University, B.A. The author is especially grateful to my comrades Elizabeth Haddix, Senior Staff Attorney at the Center, and Brenda Shum and Ezra Rosenberg of the Lawyers Committee for Civil Rights Under Law, for their superhuman efforts in litigating these cases.

1. THE UNIVERSITY OF NORTH CAROLINA PRESS, SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 6 (John Charles Boger & Gary Orfield eds., 2005).

oversight of existing desegregation cases.[2] This was true even in school districts that remained racially segregated or that had achieved some measure of integration, but had since—and while still under court order—become resegregated.[3]

Despite the passage of time since these desegregation orders were entered—and it is estimated that there remain over 100 school districts still subject to such orders[4]—their legal significance in potentially achieving integration should have increased, especially in the face of Court decisions deifying "intent" in proving discrimination and severely limiting the role of race in student assignment for districts not subject to desegregation orders.[5] This is because of the unique procedural posture of such cases. Under well-established school desegregation jurisprudence, once a court finds the school district constitutionally liable for racial discrimination in violation of the 14th Amendment (i.e. that is has operated a racially "dual" system) and a desegregation order is entered, the district has an affirmative duty to remedy the segregation by taking "all steps necessary to eliminate the vestiges of the unconstitutional de jure system."[6] The legal presumption for a school district subject to such an order is that any current racial imbalances within the school system are vestiges of past discrimination.[7] In order to be declared "unitary" and relieved of further court oversight, the evidentiary burden rests with the school board to rebut this presumption and prove that it has remedied the impacts of past segregation to the extent practicable, and to demonstrate that any remaining racial disparities are the result of independent factors unrelated to the board's actions (or inactions).[8] Thus, the distinction between a district still subject to court order and one that has been declared unitary (or was never subject to order) is significant. A

---

2. THE UNIVERSITY OF NORTH CAROLINA PRESS, *supra* note 1 at 9–12.

3. *Id.*

4. *See* YUE QIU & NIKOLE HANNAH-JONES, PRO PUBLICA, A NATIONAL SURVEY OF SCHOOL DESEGREGATION ORDERS (2014), http://projects.propublica.org/graphics/desegregation-orders (showing 330 school districts subject to mandated school segregation orders).

5. *See* Freeman v. Pitts, 503 U.S. 467, 501 (1992) (stating that the Equal Protection Clause reaches only those racial imbalances shown to be intentionally caused by the State); Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okl. v. Dowell, 498 U.S. 237, 245–46 (1991) (stating that courts have used the term "dual" to denote a school system which engages in intentional segregation of students by race, and "unitary" to describe a school system which is in compliance with the command of the Constitution that that no State shall deny to any person the equal protection of the laws).

6. *Freeman*, 503 U.S. at 485.

7. *Id.*

8. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–459 (1979) (citing Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968).

district under court order to desegregate may and often must use race-based policies and practices as necessary to fulfill its affirmative remedial obligations under the order,[9] while the much more restrictive and limited consideration of race in schools, as proscribed in *Parents Involved*,[10] applies only to districts that have never been under court order or that were at one time but have since achieved unitary status.[11]

The continuing viability of the bright-line legal distinction between districts under court order—with the concomitant burdens of proof and remedial obligations to address the continuing vestiges of racial discrimination—and those that are not was the focus of two recent decisions by the Fourth Circuit in a case that began in the 1960s.[12] In its first opinion, the Court issued a ruling that resoundingly reaffirmed the progressive jurisprudence that helped the nation begin to achieve the promise of *Brown* and attain a significant measure of school integration.[13] In a subsequent decision in the same case just three years later however, the Court retreated from its earlier holding, blurred the clear line it had previously recognized, and added another substantial setback to the legal struggle to end racial isolation in public schools.[14]

II. SOME BACKGROUND ON DESEGREGATION IN PITT COUNTY: EDWARDS V. GREENVILLE CITY BOARD OF EDUCATION AND TEEL V. PITT COUNTY BOARD OF EDUCATION

In the early 1970s, as a result of litigation brought by African American parents, the then separate Pitt County and Greenville City school districts were placed under court orders to desegregate.[15] During the early 1970s,

---

9. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1971).

10. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 737–38, 747–48 (2007).

11. *Id.*

12. Everett v. Pitt Cnty. Bd. of Educ., 788 F.3d 132, 139–40 (4th Cir. 2015); Everett v. Pitt Cnty. Bd. of Educ., 678 F.3d 281, 284–85 (4th Cir. 2012).

13. *See* Everett v. Pitt Cnty. Bd. of Educ. (*Everett I*), 678 F.3d 281, 290 (4th Cir. 2012) (stating that where a school district has not attained unitary status the evidentiary burden is on the school board to prove that a student assignment plan is consistent with controlling desegregation orders and fulfills the school board's affirmative duty to eliminate vestiges of discrimination and move toward unitary status).

14. Everett v. Pitt Cty. Bd. of Educ. (*Everett II*), 788 F.3d 132, 149–50 (4th Cir. 2015).

15. Opinion and Order at 6, Teel v. Pitt Cnty. Bd. of Educ., 272 F.Supp. 703 (E.D.N.C.1967) (No. 6:65-CV-569); Memorandum Opinion and Order at 7, Edwards v. Greenville City Bd. of Educ., No. 6:69-CV-702, (E.D.N.C. July 7, 1970).

both districts worked to implement their respective desegregation orders.[16] Following the implementation of these plans, both districts experienced an increase in student integration, but by the end of the decade and into the early 1980s, the county began to experience increasing inter-district segregation as white students abandoned the city schools for the county.[17] In an effort to stem the resegregation of the school systems, the districts merged into the current Pitt County Schools in 1987.[18] The merged district remained subject to the court's desegregation orders, although the case remained dormant for many years.[19]

In 2005, faced with significant resegregation in a number of elementary schools, the School Board ("Board") adopted a student reassignment plan specifically designed to address the growing racial imbalances.[20] In its deliberations about the proposed reassignment, the Board specifically referred to its obligations under the existing desegregation orders and the fact that, pursuant to those orders, it was appropriate to expressly consider race in developing the student reassignment plan.[21]

A group of white parents opposed to the plan organized the Greenville Parents Association ("GPA"), and in February 2006 filed a federal civil rights complaint with the Office of Civil Rights ("OCR") of U.S. Department of Education, claiming the reassignment plan constituted race discrimination against their (white) children.[22] When the plan went forward in August 2006, it failed to reach its desired integrative effect as hundreds of white parents refused to send their children to the schools to which they had been assigned.[23]

---

16. Order at 1–2, Edwards v. Greenville City Bd. of Educ., No. 702 (E.D.N.C. July 31, 1970); Order, Teel v. Pitt Cnty. Bd. Educ., 272 F.Supp. 703 (E.D.N.C.1967) (No. 569).

17. *Everett II*, 788 F.3d at 137 (4th Cir. 2015).

18. H.B. 1487, 1986, 1985th Sess. (N.C. 1986).

19. *See Everett I*, 678 F.3d 281, 285–86 (4th Cir. 2012) (stating that United States District Court for the Eastern District of North Carolina closed the *Edward* and *Teel* cases subject to being reopened whenever a pleading was filed in either case to warrant reopening. Subsequently, the Pitt County Board of Education remained subject to the *Edwards* and *Teel* desegregation orders for over thirty years before the cases were consolidated and reopened).

20. *See id.* at 285 (stating that the 2006–2007 academic year assignment plan, adopted under the Pitt County School Board Policy 10.107, specified that all Pitt County schools should be within an overall 70/30 racial balance); *see also id.* at 285 n.3 (explaining that the racial imbalances in the Pitt County School district remained).

21. *Everett I*, 678 F.3d at 285.

22. *Everett II*, 788 F.3d 132, 152 (4th Cir. 2015).

23. Rather than send their children to the majority African American schools to which they had been assigned, white parents "enrolled their children in private schools, transferred their children to other public school systems, or requested transfers for the children within PCS. Some parents actually moved." *See supra* note 14, at 8.

During the course of its investigation, OCR learned of the outstanding desegregation orders in *Edwards* and *Teel*.[24] As part of a negotiated settlement of the complaint, the Board agreed to return to federal court and seek clarification of the continuing applicability of those orders and its related obligations.[25] Notably, in returning to court, the Board did not pursue a declaration of unitary status, but instead filed a motion seeking court approval of the 2006 assignment plan, arguing that its actions were appropriate precisely because of the ongoing affirmative obligations under the desegregation orders.[26]

Following the filing of the Board's motion, the court reopened and consolidated *Edwards* and *Teel*.[27] At that time, the Pitt County Coalition for the Education of Black Children (the "Coalition"), a community-based education advocacy organization, and individual African American parents joined the case as the substitute plaintiffs; GPA was permitted to enter as intervenor-plaintiffs.[28] GPA then filed a motion for unitary status, claiming that the Board was no longer controlled by *Teel* and *Edwards*.[29] The school district opposed the motion; so did the Coalition and African American parents, who believed the district had still not become fully integrated.[30] Following court-ordered mediation, a settlement was reached which the court approved in November 2009.[31]

The Consent Order specifically considered whether the Board had eliminated the vestiges of discrimination as required by the desegregation orders, and concluded it had not: "It is time for the School Board to follow course and fulfill its obligation to attain unitary status so that it may reclaim complete control over its schools."[32] The court confirmed that the desegregation orders were still controlling, and also noted that its jurisdiction over the matter continued.[33] The parties were ordered to "work

---

24. *See,* US Department of Education Office of Civil Rights Claims Processing Manual, Section 110, (February 2015)

25. *Everett II*, 788 F.3d at 138.

26. Motion for Court Approval of Student Assignment Plan and Sch. Attendance Area Policy at 1, John Doe v. Greenville Bd. of Educ., No. 6:69-CV-00702 (E.D.N.C. March 18, 2008).

27. *Everett II*, 788 F.3d at 138.

28. *Everett II*, 788 F.3d at 136; Juvenile Male 1 et al v. Pitt Cnty. Bd. of Educ., No. 6:69-CV-702 (E.D.N.C. July 22, 2008).

29. Motion for Declaratory Judgment, Injunctive Relief, and Attorney's Fees at Everett et el v. Pitt Cnty. Bd. of Educ., 6:69-CV-702 (E.D.N.C. August 4, 2008).

30. *Everett II*, 788 F.3d at 138.

31. Order at 3–4, Everett et al v. Pitt Cnty. Bd. of Educ., No. 6:69-CV-702-H (E.D.N.C. Nov. 4, 2009).

32. *Id.*, at 6.

33. *Id.*

toward attaining unitary status so that the court may relinquish jurisdiction over this case and restore to the school board full responsibility for the operation of its schools," and to submit, on or before December 31, 2012, "a report detailing the School Board's efforts and progress in achieving unitary status and eliminating the vestiges of past discrimination to the extent practicable."[34]

In 2010, also pursuant to the Consent Order, the Coalition and the GPA participated in two day-long Board "retreats" to discuss and develop the new 2011-12 student reassignment plan.[35] At the end of its deliberative process, the Board rejected a proposed assignment plan which produced the most improved racial balance of the various options presented, and instead selected a plan which projected significant increases in racially-identifiable, non-white schools and would open a brand new elementary school as one of the most racially isolated schools in the district.[36] Despite concerns among both the Coalition and the GPA that the selected plan moved the district further away from unitary status, and thereby violated the consent order and the orders in *Edwards* and *Teel*, the Board refused requests to seek court approval before moving forward.[37]

In response to the adoption of the 2011-12 reassignment plan, the Plaintiffs filed a motion to enjoin its implementation on the grounds that it violated the 2009 Consent Order and the Board's affirmative desegregation obligations under *Edwards* and *Teel*.[38] They argued that the board had the burden to prove that the selected reassignment plan worked to eradicate the vestiges of race discrimination and move the district toward unitary status, and that it in fact did just the opposite.[39] In denying the motion, the court ignored the uncontroverted fact that the district remained under court order and placed the burden of proof not on the board, but on the Coalition and individual Black parents.[40] Evaluating the motion under the general preliminary injunction standard, the court held that the Plaintiffs had not satisfied their burden to show "likelihood of success on the underlying merits," and additionally, that the "balance of the equities" tipped in the

34. *Id.*

35. *Everett I*, 678 F.3d at 286, 293.

36. *Id.* at 286–87.

37. *Id.* at 287.

38. Motion for Injunctive and Other Appropriate Relief at 11–12, Everett et al v. Pitt Cnty. Bd. of Educ., No. 6:69-CV-702 (E.D.N.C. April 9, 2011).

39. *Id.* at 11.

40. Everett v. Juvenile Female 1, No. 6:69-CV-702-H, 2011 WL 3606539, at *2 (E.D.N.C. Aug. 16, 2011), *vacated and remanded sub nom* Everett v. Pitt Cty. Bd. of Educ., 678 F.3d 281 (4th Cir. 2012).

Board's favor.[41] The plaintiffs' appeal of this decision led to the Fourth Circuit's first decision in the modern iteration of this case.

III. A BRIEF HISTORY OF SCHOOL DESEGREGATION

In order to place the *Everett* decisions of the Fourth Circuit in the appropriate context in the spectrum of school desegregation litigation and to effectively evaluate their impact, some foundational background on the evolution and de-evolution of school desegregation jurisprudence is critical.

Brown v. Board of Education (*Brown I*), with its seminal declaration that "[s]eparate educational facilities are inherently unequal," made racial segregation in schools unconstitutional.[42] *Brown II*, decided a year later, was expressly dedicated to the issue of remedy.[43] Despite that narrow focus however, the Court failed to provide any detailed guidance for implementation or enforcement of federal court desegregation orders. *Brown II* included no specific benchmarks for the lower courts, which were generally instructed to use their "traditional attributes of equity power" to "eliminate a variety of obstacles" and for schools and states to do so with "all deliberate speed."[44]

For more than a decade following *Brown II*, the Court failed to provide any substantive guidance on remedy or implementation. Ten years after the 1955 ruling, no more than 2% of African American children attended integrated schools.[45] A few cases declared certain overt tactics to evade *Brown* unconstitutional,[46] but overall there was virtual silence from the Court. It would take the passage of the Civil Rights Act of 1964, which authorized the federal government to initiate school desegregation suits without any private plaintiffs and to deny federal funding to school districts that maintained racial segregation, coupled with more aggressive

---

41. *Everett et al v. Pitt County Board of Education,* 2011 U.S. Dist. LEXIS 91875 (August 16, 2011). In describing the "equities," the court cited the potential "great disruption" of enjoining the assignment plan when school was scheduled to begin just 10 days from the date of the order. This was particularly ironic; although the Plaintiffs' Motion was filed in April, the court did not hold the hearing on the motion until a few weeks before the start of the school year implementing the challenged plan.

42. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495 (*Brown I*) (1954), *supplemented sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (*Brown II*) (1955).

43. *Brown II*, 349 U.S. 294, 300 (1955).

44. *Id.*, at 300.

45. THE UNIVERSITY OF NORTH CAROLINA PRESS, SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 5 (John Charles Boger & Gary Orfield eds., 2005).

46. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958).

enforcement from the Johnson administration, to ultimately break through both the inertia of the courts and the massive resistance, particularly in the South, to desegregation.[47]

Unlike *Brown II*, *Green v. County School Board of New Kent County* provided the first detailed guidelines for school desegregation, and established the substantive standard by which all subsequent cases would be evaluated.[48] The Court stated that once a school district has been found constitutionally liable for operating a segregated or "dual" system, it has an "affirmative duty to take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," and "to come forward with a plan that promised to work realistically 'now'."[49] A desegregation plan must be "meaningful and immediate," and must address six factors the district courts would evaluate in determining whether the school system had become "unitary" and eliminated the vestiges of unconstitutional segregation.[50] The Court also provided that in developing and implementing desegregation plans, school boards were required to act in good faith.[51] *Green* put to rest any legal argument about the nature and scope of *Brown*, making clear that the obligation on states and school boards was not simply to stop segregating students, but to provide racially integrated educational settings.[52]

Swann v. Charlotte-Mecklenburg[53] established that courts had the authority to require more direct remedies to achieve integration, especially in the face of delay or inadequate desegregation plans brought forth by school districts.[54] "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked.[55] Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad."[56] Recognizing that because of the legacy of residential segregation, any reliance on proximity or neighborhood schools would mean the perpetuation of racially isolated schools, *Swann* approved

47. THE UNIVERSITY OF NORTH CAROLINA PRESS, *supra* note 1 at 5–6.

48. Green v. Cty. Sch. Bd. of New Kent Cty., Va., 391 U.S. 430, 439 (1968).

49. *Id.*

50. *Id.* at 435 (stating that the six factors are: (1) student assignment; (2) faculty; (3) staff; (4) transportation; (5) extracurricular activities and; (6) facilities).

51. *Id.,* at 439.

52. *Id.* at 442 (stating that school boards must be required to formulate a new plan to fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools).

53. 402 U.S. 1 (1971).

54. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 32 (U.S. 1971).

55. *Id.* at 15.

56. *Id.*

the widespread use of cross district busing as a method to eliminating the vestiges of discrimination in student assignment.[57]

Green and *Swann* represent the pinnacle of legal rulings on desegregation. But following the election of Richard Nixon, the aggressive pace of school desegregation was slowed down.[58] Nixon pulled back federal enforcement and appointed more conservative judges to the federal bench, including William Rehnquist and Lewis Powell, who had been the former chair of the Richmond, Virginia school board.[59] Powell was a staunch opponent of busing, and had authored an amicus brief in *Swann* in support of the school district.[60] He would play a decisive role in the next significant desegregation case, *Keyes v. School District No. 1*.[61]

Keyes was both a step forward and a turning away from the promise of *Brown*. The primary significance of the Denver case was that although neither the school district nor the state ever had a formal *de jure* policy of racial segregation, the Court nonetheless held that the district policies and practices had intentionally created racially segregated schools.[62] "Intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious."[63] This holding meant that school districts anywhere in the country could potentially be liable for unconstitutional racial segregation and not just those southern states that had adopted racial segregation as a matter of law.

But the Court unfortunately missed the opportunity to eliminate the previously established legal distinction between *de jure* and *de facto* segregation (only the former had been held to impose constitutional liability).[64] There were five members of the Court prepared to recognize that *de facto* segregation—and facially neutral polices or practices that furthered or exacerbated such segregation—violated the Equal Protection clause. Justice Powell was the necessary fifth vote to abandon the distinction, but he wanted the Court to pull back on the holding in *Swann* and its endorsement

---

57. *Id.*, at 29–30.

58. RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 604 (2008).

59. PERLSTEIN, *supra* note 58 at 605.

60. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 284, 296 (1994).

61. Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 253 (1973) (stating that the "single most disruptive element in education today is the widespread use of compulsory transportation").

62. *Keyes*, 413 U.S. at 208.

63. *Keyes*, 413 U.S. at 208.

64. *Keyes*, 413 U.S. at 214–15.

of busing, to which he remained staunchly opposed.[65] Ultimately, Powell wrote separately, concurring in part and dissenting in part.[66] In addition to severely limiting the scope of school desegregation, maintaining the *de jure/de facto* difference became a key factor in the significance of the distinction between districts still under court order and those that are not, which played a central role in *Everett II*.[67]

Milliken v. Bradley[68] epitomized the opportunity that the Court had squandered in *Keyes*, and helped seal the fate for broad and meaningful school integration. By the early 1970s, white flight from Detroit left the city school district over 90% African-American.[69] Meanwhile, approximately 50 suburban, majority white districts ringed the city.[70] Following a finding of intentional race discrimination (pursuant to the theory in *Keyes*) by the district court, and given the demographic pattern that had emerged in reaction to integration, the proposed remedy was an inter-district plan that would include the city and the suburban schools.[71] The Supreme Court reversed this decision, holding that a remedy involving the white school districts was inappropriate, since there was no evidence that those districts had intentionally created the segregation in Detroit.[72] Emphasizing that interference with local control of schools "is contrary to the history of public education in our country,"[73] the decision put the Court's imprimatur on "white flight" away from schools attempting to integrate. Justice Marshall, in an eloquent and portentous dissent, wrote:

> Today's holding, I fear is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is of neutral principles of law. In the short run, it may seem the easier course to allow our great metropolitan areas to be divided up into two cities—one white and one black—but it is a course, I believe, our people will ultimately regret.[74]

---

65. JEFFRIES, *supra* note 60, at 298–99, 303.
66. *Keyes*, 413 U.S. at 217.
67. *Everett II*, 788 F.3d 132, 147 (4th Cir. 2015).
68. Milliken v. Bradley, 418 U.S. 717, 753 (1974).
69. *Id.*, 418 U.S. at 726, 800.
70. *Id.*, 418 U.S. at 800.
71. Bradley v. Milliken, 484 F.2d 215, 244 (6th Cir. 1973), rev'd, 418 U.S. 717 (1974).
72. *Milliken*, 418 U.S. at 744–45.
73. *Id.*, at 741.
74. *Id.*, at 814–15.

Through the 1980s and 1990s, the Court issued a series of decisions that made it easier for districts to end federal court oversight of their schools.[75] In *Freeman v. Pitts*,[76] the Court considered whether a district could be declared unitary as to some of the *Green* factors and remain under court supervision as to others.[77] While the Court's "yes" answer to that question is the reason *Freeman* is primarily recognized, the decision is also important for its analysis of demographic shifts, residential segregation and, most importantly, the idea that the causal connection between current racial imbalances and the *de jure* constitutional violation may have been broken years prior to the formal declaration of unitary status.

The Dekalb County, Georgia, school district had experienced significant demographic shifts over the 15 years following the desegregation order,[78] and the Court agreed that these demographic shifts had "an immense effect" on the racial composition of the schools and were unrelated to prior *de jure* segregation.[79] The Court concluded that the district's original implementation of the 1960s era desegregation plans fully complied with the court's mandate, and that unitary status was thus achieved in the area of student assignment, regardless of the subsequent or current racial disparities, since those were due to independent demographic changes.[80]

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated. Residential housing choices, and their attendant effects on the racial

---

75. *See, e.g.*, Bd. of Educ. Okla. City Schs. v. Dowell, 498 U.S. 237, 248 (1991) (stressing the importance of local control and the "temporary" nature of judicial intervention, even in the face of present racial isolation if not connected to past intentional segregation).

76. Freeman v. Pitts, 503 U.S. 467 (1992).

77. *See id.* at 471.

78. *See id.* at 475. The African American student population grew from 5.6% in 1969 to 47% in 1986, and the northern part of the county had become predominantly white, while the southern part of the county had become predominantly black. *Id.*

79. *Id.*, at 476. Significantly, the Court discounted statistical evidence that the demonstrated that the current ratio of black students to white students in individual schools varied to a significant degree from the system-wide average—a metric whose critical importance had been established in *Green* and *Swann.*

80. *See id.*, at 494.

> composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.[81]

This particular aspect of *Freeman*—that a court may find that a district has achieved unitary status at some point in the past, even without having sought such a declaration or been so found by a court, and that therefore subsequent and current racial segregation in schools could not be causally related to past intentional discrimination—suggested that districts could be declared unitary retroactively and thereby avoid being held liable under prevailing court orders for ongoing discrimination. The Court did not go quite that far however. *Freeman* stated that the unitary status declaration was not retroactive, and that even if the chain of causality had been broken, a district under court order still had to prove that it had complied in good faith with that court order until there is a judicial determination of unitary status.[82] That is, even if a school district had addressed past segregation, it could not take any actions that would resegregate the schools or otherwise be in contravention of the controlling court orders until the court ruled that it was unitary.[83]

In addition to these decisions, there were dozens of district and court of appeals opinions applying these rulings in unitary status cases across the country. While the particular details of those cases varied, some critical consensus emerged. First, as previously mentioned, unitary status could not be granted retroactively.[84] Second, in seeking a unitary status determination, the school district had the burden of proof to show that it has eliminated "the vestiges of past discrimination . . . to the extent practicable"[85] with regard to the *Green* factors. Courts have also repeatedly held that these factors were not exclusive, but that various ancillary factors, including student achievement, student discipline, and teacher quality, could also be

---

81. *Id.* at 495. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished . . . ." *Id.* at 494 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971)). The Court also emphasized that the passage of time may be a critical factor in determining the significance of any current racial imbalances. *Id.*

82. *See Freeman*, 503 U.S. at 492 (1992) (quoting Bd. of Ed. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991)).

83. *See id.*

84. *See* Cappachione v. Charlotte-Mecklenburg Bd. of Educ., 57 F. Supp. 2d 228, 285 (W.D.N.C. 1999) (explaining that a unitary status determination is not retroactive, and therefore, "the termination of court supervision today *cannot 'relate back' to an earlier time*." *Id.* at 285 (emphasis added)).

85. *See* Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991).

considered.[86] Finally, the district would have to prove that, at all times it was subject to the court's oversight, it had "complied in good faith with the desegregation decree . . . ."[87]

IV. THE 2011 LITIGATION AND APPEAL

In their appeal of the decision refusing to enjoin the 2011–12 assignment plan, Plaintiffs urged the court to recognize its historical power and responsibility to supervise compliance with the controlling desegregation orders.[88] They also argued that, given the admitted pre-unitary status of Pitt County Schools, the Board should have been required to bear the burden to prove that the adopted 2011–12 assignment plan was in compliance with its affirmative duty to eradicate the vestiges of the racially discriminatory dual system.[89]

In reversing the district court, the Fourth Circuit issued a powerful reaffirmation of the significance of the bright-line distinction between districts still under court order and those that have been declared unitary or were never subject to court oversight.[90] The Board first challenged whether the district court decision was a "final order," since the Consent Order said the matter was to come back before the court in December 2012.[91] The Court of Appeals rejected that claim, and held that the existence of the December 2012 reporting date had no bearing on the Board's burden—as a school district still under court order—to show that the 2011 plan moved the district towards unitary status.[92] "Any other conclusion would necessarily, but impermissibly, provide the School Board with the latitude to discriminate pending the resolution of some future hearing."[93]

---

86. *Freeman*, 503 U.S. at 491–92. *See generally* Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 319, 330–32 (4th Cir. 2001) (explaining that teacher quality, student achievement, and student disciple are other factor that can be considered).

87. *Dowell*, 498 U.S. at 249–50; *see also Belk,* 269 F.3d at 332 (4th Cir. 2001) (explaining that the district court in that case had complied with the desegregation decree in good faith).

88. *See Everett I*, 678 F.3d 281, 289 (4th Cir. 2012).

89. *See* Plaintiffs' Memorandum of Authorities on Evidentiary Questions and Contested Issues of Law at 1–2, Everett et al v. Pitt County Bd. of Educ., 678 F.3d 281 (4th Cir. 2012) (No. 11-2000), 2013 WL 3810481 (E.D.N.C.).

90. *See generally Everett I*, 678 F.3d 281 (4th Cir. 2012) (reversing the district court and holding that the school board had the burden of proof).

91. *See id.* at 288.

92. *See id.* at 290–91 (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 357 (1979)).

93. *See id.* at 288. The significance on the 2012 date to report back to the court on the progress toward unitary status was a critical aspect of Judge Niemeyer's dissent.

Turning to the substantive issues in the appeal, the court summarized the controlling Supreme Court school desegregation precedents to reaffirm that in districts still under court order, the presumption is that existing racial disparities are the result of past discriminatory conduct, and that therefore the Board must bear the evidentiary burden to demonstrate that its actions "are consistent with its continuing affirmative duty eliminate discrimination."[94] Moreover, the court highlighted that the precedents all clearly establish that this burden remains with the school board until it achieves unitary status.[95]

Reviewing the language of the 2009 Consent Order and its acknowledgement of the controlling *Edwards* and *Teel* orders, the court concluded that placing the burden of proof on the plaintiffs was erroneous.[96]

> Given that there is no dispute that the school district has not attained unitary status, the evidentiary burden should have been on the School Board to prove that the 2011–12 Assignment Plan is consistent with the controlling desegregation orders and fulfills the School Board's affirmative duty to eliminate the vestiges of discrimination and move toward unitary status.[97]

The lower court decision was vacated and the case was remanded, and the court stressed the substantial burden on the Board on remand:

> The School Board's articulation of its evidentiary burden is inaccurate. Whereas the School Board's argument is premised on its claim that the 2011–12 Assignment Plan does not move the district further from a unitary system, the School Board's actual burden is to establish that the 2011–12 Assignment plan move the school district *toward* unitary status.[98]

Judge Niemeyer's dissent, like the lower court, ignored the fact that the district was still under court order. In fact, he asserted that the 2009 Consent Order "disposed of the foundational disputes" and supplanted the *Edwards*

---

94. *See id.* at 289 (quoting Riddick by Riddick v. Sch. Bd. of City of Norfolk, 784 F.2d 521, 535 (4th Cir. 1986)).

95. *See id.*, at 290.

96. *See id.* at 290–91 (citing Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 357 (1979)).

97. *Id.* at 290.

98. *Id.*, at 291.

and *Teel* orders in their entirety.[99] As a result, the only claims the plaintiffs could now bring "would have to be couched as a breach of the settlement agreement and consent order."[100] Analyzing the case under this procedural posture, removed from the context of the district's non-unitary status, Judge Niemeyer concluded that the lower court was correct in assigning the burden of proof (to show a breach of the Consent Agreement) to plaintiffs.[101]

Although the case was remanded for further consideration, the court's opinion was a critical and powerful endorsement of the fundamental evidentiary significance of the distinction between districts still under court order and those that are not.[102] For communities and education advocates continuing to struggle with segregation in districts still under court order, the decision made clear that in any continuing litigation, the burden would be on the school board to prove that its actions were consistent with its affirmative obligations to remedy the vestiges of discrimination, rather than on the plaintiffs to meet the nearly impossible hurdle of proving intent.

V. THE 2012-2013 LITIGATION

Following the appeals court decision, on June 15, 2012 Plaintiffs filed a Motion for Expedited Reconsideration on Remand.[103] Three weeks later, the Board filed its Motion for Declaration of Unitary Status, seeking an end to all further judicial oversight of the school system and arguing that the district had been unitary for several years, as early as 2000.[104] The Board asserted that its motion should be heard at the same time that the court considered Plaintiffs' motion on remand.[105] Plaintiffs opposed consolidating the issues for hearing, arguing that the Fourth Circuit's decision made clear

---

99. *Id.,* at 292 (Niemeyer, J., dissenting).

100. *Id.*

101. *See id.* at 293 (Niemeyer, J., dissenting). The dissent also focused on the December 2012 reporting date in the Consent Agreement, stating that there should be not be "any review of this issue [unitary status] until the December 31, 2012 report is filed . . . and the issue is present to the court," but also acknowledged that "the ultimate question of whether unitary status has been achieved . . . is a different question and will have to be satisfied by evidence produced by the Board." *Id.* at 292–93.

102. *See id.* at 284 (holding that the school board would have the burden of proof to prove that its actions were consistent with its affirmative obligations to remedy the vestiges of discrimination).

103. Memorandum of Law in Support of Plaintiff's Motion for Expedited Reconsideration on Remand, Everett et al v. Pitt County Bd. of Educ., 678 F.3d 281 (4th Cir. 2012) (No. 6:69-CV-702-H), 2012 WL 8679642 (E.D.N.C.).

104. Defendant's Motion for Declaration of Unitary Status at 1–2, Everett et al v. Pitt County Bd. of Educ., 678 F.3d 281 (4th Cir. 2012) (No. 6:69-CV-702-H).

105. *Id.* at 2.

that a ruling on their motion regarding the 2011–12 assignment plan was a condition precedent to the court's consideration of unitary status (that is, unless the Board could meet its burden and prove that the assignment plan was consistent with its affirmative desegregation obligations, it could not be declared unitary). The district court disagreed, ruling that it would "address the matters together,"[106] and the Board's unitary status motion and the Plaintiffs' motion challenging the 2011–12 student reassignment plan, were tried by the court in July 2013.[107]

The district court issued its order on September 25, 2013, declaring the school district unitary "in all respects," and releasing the school district from all desegregation orders.[108] The court found the Board had "fulfilled its duty to eliminate the vestiges of past discrimination . . . prior to the [1986] merger [of Pitt County and Greenville City schools],"[109] and declined to consider Plaintiffs' motion for an injunction, dismissing it as moot "[i]n light of the finding that the school district is unitary . . . ."[110]

The district court never substantively considered the 2011–12 assignment plan nor the evidence of its segregative impacts. By finding that both pre-merger districts had fully desegregated by the early 1980s and had therefore broken the chain of causality from the era of *de jure* segregation, any current racial disparities among schools must be the result of demographic change and private choice, not the responsibility of the school system.[111] Therefore the court was free to disregard the evidence that the 2011–2012 plan increased racial isolation in Pitt County Schools, and simply ruled that the motion was moot.[112]

> Even assuming, arguendo, that the School Board is unable to meet its burden of proof as to the 2011–2012 plan, an order enjoining the continued implementation of this plan would be pointless since the school district has been declared unitary and no

106. Order Requiring Status Conference and Administrative Hearing at 4, Everett et al v. Pitt County Bd. of Educ., 678 F.3d 281 (4th Cir. 2012) (No. 6:69-CV-702-H).

107. Everett v. Pitt County Bd. of Educ., 2013 U.S. Dist. LEXIS 189693, *1 (E.D.N.C. Sept. 25, 2013).

108. Everett v. Pitt County Bd. of Educ., 2013 U.S. Dist. LEXIS 189693, *46 (E.D.N.C. Sept. 25, 2013).

109. *Id.* at *35.

110. *Id.* at *46.

111. *Id.* at *13–14.

112. *Id.* at *46.

longer has an affirmative duty to ensure that its policies move the district toward unitary status."[113]

Convinced that the court's decision was inconsistent with precedents establishing that unitary status could not be granted retroactively, the express language of the 2009 Consent Order,[114] and *Everett I*'s direction that, upon remand, the school board must bear the burden to prove that the 2011–12 student assignment plan "moves the school district toward unitary status,"[115] Plaintiffs again appealed to the Fourth Circuit.[116]

VI. THE 2013 APPEAL (*EVERETT II*)

The primary issues in the *Everett II* appeal were the trial court's declaration of unitary status retroactive to 1986 and its concomitant refusal to make a determination as to whether the 2011 student assignment plan moved the district toward unitary status, as the court's 2012 opinion required.[117] This time, in another 2-1 decision, the court affirmed the district court ruling.[118]

The essence of the new opinion turned on the questions of the retroactive nature of the lower court's opinion and whether a ruling on the Plaintiffs' original motion to enjoin the 2011-12 assignment plan was a condition precedent to a determination as to unitary status.[119] The analysis begins with a review of the core elements of a unitary status determination (discussed in part 3, *supra*). The court noted that "until declared unitary, a school district retains a continuing duty to work toward eliminating the vestiges of its past discrimination," and reaffirms that "a school district operates under a presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the school board," until it has achieved unitary status.[120] But then the court makes a

---

113. *Id.* at *46–47.

114. *See generally* Order Approving Settlement and Grant.

115. *Everett I*, 678 F.3d at 291.

116. *Id.* at 284.

117. *Everett II,* 788 F.3d at 142–43. The case was argued in Richmond on December 9, 2014, before the same panel that heard *Everett I*: Judges Niemeyer, Wynn, and Diaz. Judge Wynn dissented

118. *Id.* at 150.

119. *See supra* Part III.

120. *Everett II,* 788 F.3d at 143, 145 (citing Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 26 (1971); Sch. Bd. of the City of Richmond, Va. v. Baliles, 829 F.2d 1308, 1311 (4th Cir. 1987); Riddick by Riddick v. Sch. Bd. of City of Norfolk, 784 F.2d 521, 535 (4th Cir. 1986); Vaughns by Vaughns v. Bd. of

bold conclusion on retroactivity.[121] Relying on its 1987 decision in *Sch. Bd. of Richmond v. Baliles*,[122] the opinion states "[i]mportantly, the burden of proof shifts, not when the school district is declared unitary, *but when the district court determines is first achieved that status*."[123] The court then minimized the significance of this critical aspect of the opinion: "[t]he court's "retroactive" unitary status declaration merely shifts the burden of proving discriminatory intent."[124]

In affirming the lower court's decision to consider the board's unitary status motion first and its refusal to even rule on the Plaintiffs' original motion, Judge Diaz invoked the talisman of local control. Citing heavily from *Freeman*, *Dowell*, and *Milliken*, the court said

> It would be anathema to the goal of quickly and efficiently returning a school district to local control if the district court were to ignore its conviction that the Pitt County school district is unitary, and instead analyze the 2011-12 student assignment plan through a prism of state-mandated segregation that no longer exists.[125]

Had the Plaintiffs' alleged or proved *intentional* discrimination by the Board in adopting the 2011 student assignment however, the analysis would be different. But because the motion for injunctive relief "depends entirely on their allegation that the plan moves the district further from unitary status," and the lower court concluded that "the school district was unitary at the time of the plan's implementation (and has remained so), it did not err in dismissing Plaintiffs' motion for injunctive relief as moot."[126]

The opinion then turns to the lower court's evaluation of the *Green* factors, emphasizing that while there was a presumption that existing racial

---

Educ. of Prince George's Cty., 758 F.2d 983, 988 (4th Cir. 1985)).

121. *See id.* at 143.

122. 829 F.2d. 1308 (4th Cir. 1987).

123. *Everett II,* 788 F.3d at 143 (emphasis added). The court asserted that in Baliles, it affirmed a finding by the district court that the school district had achieved unitary status (although had not been declared unitary by the court) sometime prior to the hearing currently before the court, and therefore shifted the burden to the plaintiffs to prove the current racial disparities were vestiges of past discrimination, then found that plaintiffs failed to meet that burden.

124. *Id.,* at 144.

125. *Id.*

126. *Id.*, at 145. Of course, the issue of intentional discrimination and the burden of proof is at the core of the unitary status analysis and the basis of the bright line that distinguished districts still under court order.

disparities are traceable to the legacy of *de jure* segregation, "that presumption is overcome when a school district demonstrates that racial disparities are a result, not of its present or past discrimination, but rather external factors, such as demographic changes, beyond the district's control."[127] Specifically noting that "[i]n cases in which the district court's factual findings turn on . . . the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference," the lower court's determination to rely exclusively on the student assignment analysis provided by the Board's expert witness was affirmed, as were the court's factual findings that the district had attained unitary status on the remaining *Green* factors.[128] The opinion concludes by approving the lower court's determination that "the Board has demonstrated commendable good faith in complying with the desegregation orders."[129]

Judge Wynn, who authored *Everett I*, wrote a blistering dissent, asserting that the district court decision "utterly fails to analyze the facts in this case in compliance with this Court's instructions and established Supreme Court precedent."[130] He cites two fundamental flaws in the district court ruling: first, it "failed to consider the effects of the 2011–12 Plan when determining what the School Board complied in good faith with prior orders;"[131] and second, "gave retroactive effect to its declaration of unitary status so as to retroactively release the Board of its obligations under controlling orders in direct contravention of . . . *Everett I*."[132]

Judge Wynn begins with the question of good faith, an issue "particularly salient in the case," given the 2009 Consent Order, "which required the Board to move towards unitary status."[133] He then chides the lower court for its failure to consider that the 2011-12 assignment plan, "which came on the heels of the 2009 Consent Order and resulted in *more rather than fewer* racially imbalanced schools in the district . . . a violation of the Board's obligation . . . under the 2009 Order."[134] Because the Board had less discriminatory alternative plans from which to choose, but selected the plan "with full awareness of the regressive impacts on the school

---

127. *Id.* (citing Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 26 (1971).

128. *Id.* at 147 (quoting F.T.C. v. Ross, 743 F.3d 886, 894 (4th Cir. 2014).

129. *Id.*, at 149. The opinion pointed to the long dormancy of the case, the Board's efforts with the 2006 assignment plan, and its initial efforts to implement the *Edwards* and *Teel* orders as evidence of good faith.

130. *Id.*, at 151 (Wynn, J., dissenting).

131. *Id.*

132. *Id.*, at 154.

133. *Id.*

134. *Id.*, at 155.

district's racial balance," Judge Wynn concludes that the Board had failed to act in good faith.[135]

The dissent was even more troubled by the retroactivity of the unitary status determination. Harkening back to *Everett I*'s warning that prematurely relieving the Board of its burden under the existing court orders would "impermissibly provide the School Board with latitude to discriminate pending the resolution of some future hearing,"[136] Judge Wynn recognized that this is in fact exactly the outcome produced by the district court's opinion and the majority's affirmance.[137] He found the majority's reliance on *Baliles* misplaced given the unique procedural posture of *Everett II*, and in particular the existence of the 2009 Consent Order and the court's decision in *Everett I*.[138] "Such a holding has troubling implications: will others bound by desegregation orders take the majority's holding as a signal that *de facto* unitary status in the eyes of a school district gives the school district license to act as though it were not under court order?"[139]

VII. SOME CONCLUSIONS

The Fourth Circuit's ruling in *Everett II* represents not only a reversal of its own previous opinion in the case, but a subversion of long-standing unitary status and school desegregation precedents that, as Judge Wynn noted, portends ominously for any future efforts to hold school districts still under court order accountable to fully and meaningfully integrate their schools.[140]

As to the specific facts of the *Everett* cases, the court's failure to consider the unique procedural and factual context of the case is particularly troubling.[141] Although the original desegregation orders had been dormant for decades, unlike many of the cases relied on by the majority opinion, by *Everett II* there had been recent, active litigation that not only reaffirmed the continuing viability of those previous orders, but also included a new Consent Order and a Fourth Circuit decision that emphasized the district's non-unitary status and its affirmative duty to move towards fully and finally

---

135. *Id.*

136. *Id.*, at 155 (quoting Everett et al v. Pitt County Bd. of Ed (Everett I), 678 F.3d 281, 288 (4th Cir. 2012)).

137. *Id.*, at 155.

138. *Id.*

139. *Id.*

140. *Id.*, at 151, 155.

141. *See id.*, at 150 (citing Everett et al v. Pitt County Bd. of Ed (Everett I), 678 F.3d 281, 288 (4th Cir. 2012)).

addressing that status. As a result, the Supreme Court's stated concern about the impacts of the passage of time[142] should have had no substantive bearing, since a range of questions about the district's continuing desegregation obligations had been asked and answered several times within the preceding five years.[143]

The undisputed evidence about the segregative effects of the 2011-12 assignment plan also undercuts the court's "good faith" analysis. The Board, while still non-unitary and subject to the desegregation orders, Consent Order, and *Everett I*, adopted a student assignment plan that it knew would increase racial segregation in the schools in Pitt County, and rejected a less discriminatory alternative. Such action was plainly in contravention of the orders and, according to *Freeman*, clear evidence of bad faith:

> A history of good-faith compliance is evidence that any current racial imbalance *is not the product of a new de jure violation*, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.[144]

Equally problematic in this case was the retroactive declaration of unitary status. Not only does this conclusion undermine the well-established bright line that distinguishes districts under court order and those that are not, but it effectively cedes the determination of unitary status and its related obligations to the Board itself.[145] And so in *Everett* we find a school board that asserts it is under court order and therefore obligated to consider race in its 2005 student assignment plan, then when challenged about discrimination in its 2011–12 plan asserts it attained unitary status decades earlier.[146] The district court then concludes that it need not even consider the adverse impacts of the plan, because the Board had no obligation to comply with court orders since 1986, even though it had itself issued an order in 2009 that the Board had not achieved unitary status.

As Judge Wynn noted, the broader problem with a retroactive declaration of unitary status (or the retroactive effect of a present-day declaration) is that it relieves a pre-unitary school board of its affirmative

---

142. *See, e.g.*, *Freeman*, 503 U.S. at 491 (considering the passage of time and the degree to which racial imbalances continue to represent vestiges of constitutional violations may diminish).

143. *See Everett II*, *788 F.3d* at 145.

144. *Freeman*, 503 U.S. at 498 (emphasis added).

145. *Everett II*, 788 F.3d at 144..

146. *Everett II*, 788 F.3d at 139.

duty to eliminate the vestiges of discrimination *before* a court has determined that such relief should be granted. Retroactive effect allows a school board to act in a potentially discriminatory fashion or to implement policies with overt discriminatory effects without having been declared unitary. This undermines the bright line burden of proof, presumptions regarding racial disparities, and affirmative remedial obligations that attach to a district still under court order, including the absolute obligation to comply in good faith with those court orders, until the district is declared unitary.[147] Additionally, retroactive unitary status allows a school board to begin to act as though it had already achieved unitary status (and to ignore, for example, the increased racial isolation in a proposed student assignment plan), without court order or by seeking such a declaration after the fact.

This radical re-imaging of good faith and the retroactive application of unitary status creates new and significant challenges for pursuing integration in school districts still under court desegregation orders. Because the Supreme Court has limited the opportunities for promoting racial diversity in districts that are no longer or that never were under court order, those districts which can still consider race under their remedial obligations had offered the best legal strategy for fully realizing the vision of *Brown* and finally eliminating the vestiges of discrimination. The Fourth Circuit's break with precedent in *Everett II*, with its abandonment of any substantive or practical evaluation of good faith and its willingness to look back in time past continuing and current inequities, may create a new reality in which a school board still under judicial supervision has the ability to decide when and whether it should comply with court orders, and may soon bring about a new wave of unitary status declarations, even as our schools grow more and more racially segregated.

147. *See id.* at 151.

*